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SENATE

REPORT
99-492

RULEMAKING PROCEDURES REFORM ACT OF 1986

SEPTEMBER 26 (legislative day, SEPTEMBER 24), 1986.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 1145]

The Committee on the Judiciary, to which was referred the bill (S. 1145) to increase the accountability of, policy coordination by, and management of priorities by agencies through an improved mechanism for Congressional oversight of the rules of agencies, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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I. PURPOSE

Federal regulation is one of the most important and costly activities of government. It is estimated that regulations cost our economy between $50 and $150 billion each year. While the American people pay these costs, they tend to be hidden in the price consum-

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ers pay for goods and services—anywhere between $570 and $1,700 per household each year.[1]

Too often, regulations fail to solve the problems they were designed to address, or fail to solve them as efficiently as they could. At times, regulations "fix" one problem, but in so doing create new ones. Sometimes, regulations address the lesser risk and ignore the greater.

Striking an appropriate balance in the roles of the executive agencies, the independent agencies and the Congress in rulemaking is essential if we are to implement sensible regulations and achieve true regulatory reform. Regulations are an extension of the legislative process. They are the instruments by which the general legislation drafted by Congress and approved by the President is specifically implemented. But once Congress passes a law, its role in the all important implementation becomes limited to oversight—after the fact and often too late to remedy serious defects or damage.

All too often Congress finds that what it thought was a clear message of legislative purpose has been skewed by the implementing agency in the regulatory process so that it no longer reflects the legislative intent. In those situations, Congress conducts oversight hearings, threatens the agency's appropriations, or revisits the authorizing language. But these acts by Congress most often occur after the rule has taken effect and after the public has had to live with the adverse effects of the rule and in so doing, decided to protest it. The legislative veto reverses this order of events and allows Congressional involvement before the rule actually becomes operational.

Moreover, the employees in the executive and independent agencies are, unlike members of Congress, unelected individuals, many of whom have worked in their respective agencies for many years and who have become strong partisans for their programs, as they define them. They can be hostile to Congressional intervention or redirection. Yet it is Congress that is the accountable body of persons—the group that must face the electorate on a regular basis and account for the conduct of government and its, Congress', role in that conduct. Agency employees, on the other hand, are most often individuals who remain anonymous to the public but who retain tremendous authority and control over the implementation of their assigned programs.

The purpose of S. 1145—introduced by Senators Carol Levin (D-MI), Charles Grassley (R-IA), Robert Dole (R-KS), David Boren (D-OK), Strom Thurmond (R-SC), Paul Laxalt (R-NV), Orrin Hatch (R-UT), Alan Simpson (R-WY), Jeremiah Denton (R-AL), and Dennis DeConcini (D-AZ)—is to rebuild the legislative veto of agency regulations as a means of increasing accountability, consistent with the constitutional requirements for legislative action, as defined by the Supreme Court in Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).

In *Chadha,* the Court found unconstitutional that section of the Immigration and Nationality Act which permitted one house of Congress to veto an executive branch agency action. In this case,

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[1] "Regulatory Program of the United States Government," Office of Management and Budget, August 1986, p. xi.

the agency action was the Attorney General's discretionary authority to suspend deportation proceedings against aliens illegally staying in the United States. Specifically, Chief Justice Burger's opinion held that the one-house veto, because it had a legislative effect, violated the Bicameralism and Presentment Clauses of the Constitution, found at sections 1 and 7 of Article I.[2]

In one sweeping breath, the Court's 7–2 majority blew down, like a house of cards, more than 300 carefully constructed legislative vetoes.[3] In the wake of *Chadha*, there has been uncertainty about how Congress may check authority delegated to administrative agencies. Thus, it is important that Congress respond comprehensively and uniformly. This bill is such a response.

Senate Bill 1145 is designed to provide Congress with a regulatory oversight capability that meets Article I's requirements for legislative action, without offending the separation of powers doctrine. The bill creates a two-step process for halting agency action.

First, rules published in the Federal Register by executive and independent agencies will be considered recommendations only and cannot become effective until, in the case of major rules (as defined by the bill), 90 days after they have been reported to Congress. The waiting period for non-major rules is 45 days. At the time a rule is sent to the Federal Register for publication, the rule is also to be sent to both houses of Congress and is automatically referred for review to the committee in each house which has jurisdiction over the relevant program or underlying statute. During the waiting period, any member of either house may introduce a joint resolution of disapproval which will also be referred to the same committees of jurisdiction. The bill establishes procedures for expedited consideration of such resolutions.

After 60 days for major rules and 30 days for nonmajor rules, the committee of jurisdiction may be discharged from consideration of a joint resolution of disapproval by a motion to discharge made by one Senator in the Senate or by a motion to discharge filed by one-fifth of the Members of the House of Representatives. The bill establishes restrictions on floor consideration of the joint resolutions, including a limit to debate and amendments. If Congress has not finally acted on the joint resolution of disapproval by the end of the waiting period, the rule at issue may take effect.

The procedure for reviewing established by this bill is, of course, not the only procedure available to the Congress. Congress can, of course, at any time, pass a joint resolution of disapproval to stop a

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[2] 462 U.S. at 944–59. The irony of this holding is that it apparently ignores the fact that through its rules, agencies regularly legislate with the force and effect of law without presentment to the President. *Chadha* thus suggests that the unelected officials in the bureaucracy may bypass Constitutional procedure when they legislate, yet the Congress, elected by the people, must go through the full legislative process just to prevent the unelected bureaucrat from legislating. Levitas and Brand, "Congressional Review of Executive and Agency Actions After *Chadha:* The "Son of Legislative Veto" Lives on," 72 Geo. L. J. 801, 802 n.9 (1984).

[3] Although *Chadha* involved only a "one-house" veto, the reasoning used by the majority plainly extends to the "two-house" and "committee" veto as well. Further, any hope that the Court might limit *Chadha* to the legislative veto of purely executive agencies (such as the Immigration and Naturalization Service) was erased by the Court's summary affirmation of a Court of Appeals case striking down a section of the Federal Trade Commission Improvements Act of 1980. The FTC Act provided for a two-house veto over any rule issued by the FTC. *United States Senate* v. *FTC*, 463 U.S. 1216 (1983), aff'g 691 F.2d 575 (D.C. Cir. 1982).

rule. The procedure contained in this bill only guarantees that such a resolution could be passed before the rule takes effect.

Second, the passage of the joint resolution by both Houses of Congress gives rise to a point of order for any appropriations bill involving the relevant agency which does not bar use of government funds to implement the rule. For rules previously subject by law to a one-House veto, the passage of a joint resolution by either House of Congress would give rise to this point or order. Therefore, even if the President does not sign the joint resolution of disapproval, the agency in question may still be prevented from going forward with the rule by a lack of funds.[4]

The Committee wishes to clearly state that the purpose of S. 1145 is not to simply seize more delegated power from agencies during these times of relative deregulation. Nor is it intended to be a direct attack on the executive. Instead, S. 1145 intends to permanently facilitate essential oversight of legislative functions.

It is a fact that regulations issued by unelected agency officials have the force of law just as a statute passed by Congress. Therefore, the question remains: "Who makes the laws in this country? Is it the people who are elected, or is it the people who are not?" The answer lies in the concept of accountability. Because agencies derive power from Congressional delegation, the delegation of authority for an administrative "law" does not end until Congress has executed the fullest extent of its legislative power. S. 1145 sets up procedures to ensure legislative branch accountability for the acts of administrative agencies.

As a result of this regulatory oversight, the work product of administrative rulemaking should undoubtedly improve, as rulemakers act more responsively to Congressional and public concern. Accordingly, this should result in the rare use of the legislative veto under S. 1145.[5]

The legislative veto also has a practical virtue in today's age when it is so difficult for Congress to legislate policy, statute-by-statute, against a backdrop of crises that change almost monthly. Although this approach can be criticized as "agency delegation with strings attached", S. 1145 ensures the strings are fastened in a constitutional manner.

II. History and Need for the Legislation

The legislative veto arose in response to the increasingly complex range of government involvement in daily life and the need to accommodate executive efficiency with legislative accountability.[6]

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[4] The approach taken in S. 1145 is similar to that of a recent floor amendment to the Federal Trade Commission authorization bill (S. 1078) covering FTC and Consumer Product Safety Commission rules. Under the amendment, co-sponsored by Senators Grassley, Levin and 12 others, the passage of a joint resolution of disapproval triggers expedited procedures for consideration of an amendment to the FTC or CPSC appropriation bills limiting the use of funds to implement the disapproved rule. A motion to table the Grassley-Levin amendment was defeated 56-34 on July 26, 1985.

[5] In fact, as with past veto legislation, the real Congressional leverage will reside in the threat of a veto, which will normally persuade an agency to withdraw or modify an arbitrary rule. It is expected that S. 1145 would be the "shotgun behind the door"—a prod to make agencies act more responsibly.

[6] Levitas and Brand, "The Post Legislative Veto Response: A Call to Congressional Arms," 12 Hofstra L.Rev. 593, 610 (1984).

The origins of the legislative veto have been traced to the 18th century English Parliament.[7] Indeed, one of the many grievances enumerated against George III in the Declaration of Independence was that "[h]e has erected a multitude of new Offices and sent hither swarms of Officers to harass our people, and eat out their substance." [8]

The veto made its debut in the United States during the Hoover Administration. Facing the need to reorganize parts of the federal bureaucracy and the structure of the executive branch—and realizing that it would be better for the executive to devise its own plan than for Congress to do so—Congress delegated to President Hoover the reorganization authority. Congress, however, retained the ability to disapprove of the reorganization plans through a one-house veto.[9]

By doing this, Congress recognized two competing concerns, as explained by former Chief Domestic Policy Advisor to President Carter, Stuart E. Eizenstat:

> [Congress] as recognizing that modern industrial democracy would no longer accommodate the strict circumscription of executive power; delegation of further authority to the executive branch was in some cases appropriate in order to give the President greater discretion to meet the problems presented by modern society. But it was also qualifying that recognition in the manner of a quid pro quo, by recapturing in a veto or oversight mechanism some of the authority that it had surrendered in the interest of accomplishing a necessary governmental task. In this way, Congress delegated greater authority to the President but wanted to assure continued oversight so that the authority was exercised as Congress intended. (statement of Stuart E. Eisenstat, Committee on the Judiciary, Hearing on S. 1145, July 9, 1985)

Since the time of the first legislative veto, rulemaking has become the dominant feature of administrative agencies. When promulgated, rules and regulations govern our society with the same force and effect as the laws written by Congress.

As the modern administrative state developed, the magnitude of legislation by rulemaking has outstripped Congress' ability to directly perform its own legislative function. Vast delegations of authority to agencies have become the rule. Statutes delegating rulemaking authority often blur the line between "principle" and "detail", in the sense that the legislative mandate is often a mere skeleton (such as the Federal Communications Commission charter to regulate "as the public convenience, interest, or necessity requires"). What is often left to the agency are not the minor details, but rather the formulation of many of the essential principles in the law as well.

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[7] Legislative Veto and the Chadha Decision: Hearing Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 98th Cong., 1st Sess. 15 (1983) (statement of Rep. Pashayan).

[8] Declaration of Independence, para. 1.

[9] See, "Studies on the Legislative Veto: Subcommittee of House Rules Comm., "96th Cong., 2d sess. 170 (1980).

While an agency is formulating policy through its rules, the Committee believes it must be clear that the agency possesses its authority only because a statute has delegated such authority. The ultimate task of lawmaking remains a task committed by Article I of the Constitution to the Congress. This fact is not altered even though the Congressional responsibility for lawmaking is shared with the Executive.

As Justice White summarized in *Chadla* dissent:

> [The veto] is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking . . . the veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Article I as the nation's lawmaker. [*I.N.S.* v. *Chadha,* 462 U.S. 919, 973–74 (1983) (White, J. dissenting).]

The Committee believes that this view demonstrates a clear understanding of how government works, and that this view is furthered by enactment by S. 1145.

Consistent with the need to delegate and the desire to maintain its Constitutional role, Congress attached the legislative veto to numerous functions prior to *Chadha,* including: war powers,[10] budget impoundment and control,[11] foreign arms sales,[12] nuclear proliferation,[13] export controls,[14] immigration policy [15] and regulatory policy.[16]

Congressional enactment of statutes with legislative vetoes sharply increased during the late 1960's and 1970's. In part, this stemmed from a growing mistrust of the executive branch, as well as a general anti-Washington, anti-regulation attitude. Of the more than 400 legislative veto provisions enacted since 1932, at least two-thirds were passed after 1970. In the 1974–1975 "Watergate years" alone, 83 statutes with legislative vetoes were enacted.[17]

Although the context has differed with the times and the statute, the Congressional purpose behind the veto remains constant—to vest ultimate accountability for legislation with the legislature, as the Constitution requires. Without the legislative veto, the independent and executive branch agencies take on the character of the legislature, without the Constitutionally mandated checks upon legislative power.

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[10] War Powers Resolution, 50 U.S.C. ss 1544–1548 (1976 and Supp. V 1981).
[11] Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. ss 681–688 (1982).
[12] International Security Assistance and Arms Control Act of 1976, 22 U.S.C. s2776(b)(1982).
[13] Nuclear Non-Proliferation Act, 42 U.S.C. ss 2153–2160 (1976 and Supp. V 1981).
[14] Export-Import Bank Amendments of 1974, 12 U.S.C. s635(e)(1982).
[15] Immigration and Nationality Act, 8 U.S.C. s1254(e)(2)(1982).
[16] Education Amendments of 1974, 20 U.S.C. s1232d(a)(1982).
[17] See, "Legislative Veto After Chadha: Hearing Before the House Committee on Rules," 98th Cong., 2d Sess. 447 (1984); Rosenberg, "Congressional Life After *Chadha:* Searching for an Institutional Response," Cong. Res. Serv. Rev. 5 (Fall 1983); "Fisher, Legislative Vetoes Enavted After *Chadha*" (Cong. Res. Serv. print) (March 25, 1985); Rosenberg, The Legislative Veto in the Courts: Constitutional Challenges Before and after *Chadha,* (Cong. Res. Serv.) (unpublished), cited in, "Rulemaking Procedures Reform Act of 1985: Hearing on S. 1145 Before the Subcommittee on Administrative Practice and Procedures of the Senate Committee on the Judiciary, 99th Cong., 2d Sess. 57 (1985)."

Former Rep. Elliot H. Levitas, now an attorney in private practice, elaborated on how the veto is consistent with democratic principles and accountability:

> Congress must answer every two years, or every six years, to the people for its decisions. If a Member of Congress, or a Senator, makes decisions which his or her constituents disagree with, the constituents can make their views known at the polls. But that is not the case with the unelected officials in the bureaucratic agencies. They are not elected, they do not suffer the inconvenience of having to run for office and thus they do not have to answer to the people. It only makes sense that under our system of government, which is based on democratic principles, that those who are accountable to the people have the final say over these rules and regulations which have the force and effect of law. If the Congress finds that a rule or regulation is arbitrary, oppressive, or contrary to the intent of the law, then the Congress ought to have the right to stop that rule from going into effect. The legislative veto provided a means for doing that. (statement by Elliott H. Levitas, Committee on the Judiciary, Hearing on Legislative Veto and the *Chadha* Decision, July 20, 1983).

Critics charge that he legislative veto merely encourages Congress to delegate the "tough questions" to the agencies; that the delegations of legislative authority have been increasingly "broad and rudderless." [18] Some also suggest that the veto mechanism violates the spirit, if not the letter, of the separation of powers doctrine.[19] The reality, however, is that Congress must have this oversight mechanism if it is to avoid what Justice White termed:

> * * * a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law making functions to the executive branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role. [*I.N.S.* v. *Chadha,* 462 U.S. 919, 968 (1983) (White, J., dissenting).]

Finally, with respect to the timing of this particular legislation, it has been suggested that the need for S. 1145 has been diminished simply because the regulatory efforts of the Reagan Administration have not appeared as threatening as those of the recent past.[20]

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[18] see, "Bicentennial Institute Proceedings", 28 Ad. L.Rev. 680, 691 (1976) (statement of Prof. Antonin Scalia).

[19] Id. at 685–86.

[20] The Reagan Administration made regulatory reform a major priority, as part of its overall economic recovery program. In the 97th Congress, the Senate (by a vote of 94–0) passed S. 1080, the omnibus regulatory reform bill containing a two-house legislative veto. However, the bill died in the House Rules Committee. By executive order, the Reagan Administration has also curtailed the scope of some regulatory activity. See. Executive Orders 12291 and 12498. However, review of rules by the Office of Management and Budget does not replace the need for Congressional perspective in the rulemaking process.

However, S. 1145 is not written for this, or any other, administration. The Committee intends that S. 1145 will have continued vitality. The bill is written, not in terms of the political philosophy of the administration in power, but in terms of a regulatory reforms process that, under any set of circumstances or political leadership, will be available to assure accountability.

III. Section-by-Section Analysis

SECTION 1

Provides that the Act may be cited as the "Rulemaking Procedures Reform Act of 1985."

SECTION 2

Makes certain amendments to the Administrative Procedure Act (APA), found at Title 5 of the U.S. Code. Section 2(a) would amend section 551(4) and (15) by altering the definition of the term "rule", excepting the Tennessee Valley Authority's statements with respect to public contracts or property or general statements of policy, and by adding a new concept to the APA with the definition of the term "emergency rule".

In amending the definition of "rule" the bill omits the words "and future effect" as a definitional element. This omission is inadvertent.

Section 551(4) is also to be changed by adding a new subsection (B) which is in two parts. The first clause would provide that the definition of "rule" includes "any amendment, revision, or repeal of such an agency statement."

The second clause of section 551(4)(B) would exempt from the definition of rule Tennessee Valley Authority "statements involving a matter relating to public property or contracts or general statements of policy." The exemption traces its roots back to at least the 1982 version of S. 1080, about which the Senate Governmental Affairs Committee explained:

> This change provides that a statement by the Tennessee Valley Authority relating to the property, contracts, or the general policies of that agency is not a "rule" and therefore does not need to be promulgated through the rulemaking procedures of section 553. However, another statute may require the application of any of the procedures of the APA to these statements. In addition, another statute may establish its own procedure for the promulgation of such statements. This provision essentially carries forward the existing exemption for these matters for the TVA. The Committee had adopted this provision due to the unique status of the TVA as a wholly government-owned corporation carrying out mainly business-like activities, rather than performing regulatory functions.[21]

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[21] S. Rept. No. 305, 97th Cong., 2d sess. 14 (1982). See also S. Rept. No. 284 97th Cong., 2d sess. 108 (1982). (Senate Judiciary Committee Report on S. 1080).

Finally, section 551 is amended by adding a definition of "emergency rule", which complements a proposed revision of section 553(b)(B). Under the proposal, a new sub-category of rulemaking is created, that being emergency rulemaking. An emergency rule is a temporary action that an agency may take without having to comply with section 553's notice and comment requirements. It may be taken if the agency finds that delaying the effective date of a proposed rule would "(A) seriously injure an important public interest, (B) substantially frustrate legislative policy or intent, or (C) seriously damage a person or class of persons without serving any important public interest." Under proposed section 553(e), emergency rules terminate 120 days after they are promulgated.

Finally, section 553(c) would be amended by S. 1145 to provide for a minimum of 60 days for public comment. Current law sets no minimum period and this lack has been a traditional object of criticism.

SECTION 3

Adds a new chapter, after chapter 7, to Title 5 of the U.S. Code, called "Chapter 8—Agency Accountability". This new addition to the Administrative Procedure Act employs a joint resolution mechanism to provide Congressional oversight and possible disapproval of the lawmaking rules of all federal agencies before the rules become final as a matter of law.

Section 801, "Findings and purposes" sets out certain congressional declarations with respect to burdensome federal regulations and legislative function accountability. Congress finds and declares that federal administrative agencies, staffed by unelected—and thus unaccountable—persons, promulgate large numbers of significant regulations. Some of these rules and regulations may conflict with or duplicate other rules, thus contributing to governmental inefficiency. This may frustrate Congressional intent with respect to federal programs and may impose unnecessary burdens on regulated entities, including state and local governments. Accordingly, the objective of this chapter is to bring the administrative lawmaking process under control through rational, orderly proceduers by insuring that the end products of the new process conform to the legislative will that authorized their exercise in the first place.

Section 802, "Definitions" defines the term "rule" for purposes of the legislative veto procedures, and defines these other terms: "joint resolution", "appropriate committee", "major rule" and "emergency rule". The legislative veto procedure would apply to most rules of general applicability. Agency rules subject to this procedure are those described in Section 551(4) of the present Administrative Procedure Act as having "general [rather than particular] applicability and future effect designed to implement, interpret, or prescribe law or policy." Section 802(2)(A) of S. 1145 further emphasizes the lawmaking character of the affected rules by specifically referring to a "rule or statement [that] has general applicability and substantially alters or creates rights or obligations of persons outside the agency." Thereby excluded from S. 1145 coverage are those rules described in section 553(b)(A) as "interpretive rules, general statements of policy, or rules of agency organization, proce-

dure or practice", to the extent that such rules do not fall within the exceptions listed above. Section 802(2)(B) of S. 1145 further excludes rules "of particular applicability" such as those approving or prescribing future rates, wages, prices, services, and the like. Carefully and expressly, S. 1145 eschews use of a joint resolution of approval as a technique of Congressional oversight, under which a recommended rule would not become law unless affirmatively approved by enactment of a joint resolution in accordance with the bicameral presentment process. Thus, section 802(3) states that the term "joint resolution" means "only an unamended joint resolution which contains no preamble" and which simply provides that "the Senate and the House of Representatives disapprove the recommended final rule" in question. Thus, to express its approval of a recommended rule of general applicability, Congress need do nothing within the prescribed time periods of S. 1145 (90 or 45 days); but to express its disapproval, Congress must use the bicameral presentment processes during those periods to enact a statute that says "no." The definition of "major rule" in section 802(5) is essentially the same as that used by Executive Order 12291 [1 C.F.R. 127 (1981)]. The bill provides for the immediate implementation of a rule without the legislative veto procedure where an emergency or other exigent circumstance exists. Such "emergency rules" however, can remain effective for no more than 120 days.

Section 803, "Agenda; transmission of rules" sets out procedures to be followed prior to the Congressional review of administrative agency rules.

Pursuant to subsection (a), each agency is to semiannually prepare a list (an "agenda") of the areas in which it intends to propose rules in the following 12 months, and transmit that list to the Congress. The failure to list an area of possible rulemaking on an agenda does not prevent an agency from later proposing or issuing any rule. The first agency agenda is to be transmitted to the appropriate committees within 180 days after the effective date of this chapter. Pursuant to subsection (b), on the day the agency forwards a "recommended final rule" to the Federal Register for publication, the agency shall also send a copy of the rule and accompanying documents to each House of Congress. The word "final" in the phrase "recommended final rule" in this subsection describes what in practice may be the "final recommendation" of the agency. However, it is not a "final rule" in the traditional sense, until the Congressional processes contemplated by S. 1145 have been completed. Use of the word "final" at this point should not confuse courts dealing with this Congressional oversight mechanism. Pursuant to subsection (c), a "recommended final rule", received by the Secretary of the Senate and the Clerk of the House of Representatives, is on the same day referred to the committee(s) having jurisdiction over the program under which the rule is promulgated.

Section 804, "Review of agency rules" sets out the mechanics of the Congressional review process. Subsection (a) defines "days" as legislative days; states that the continuity of session is broken only by an adjournment sine die at the end of a Congress; and that the days on which either House is not in session for more than three days because of adjournment or recess are not included in the computation of legislative days, for the purposes of this section and sec-

tion 805. Pursuant to subsection (b), and despite the use of the word "final", any final rule transmitted to Congress shall be considered a recommendation of the agency, and shall have no force and effect as a rule of law unless such rule has become effective in accordance with this Chapter. Pursuant to subsection (c), a recommended final rule of general applicability becomes finally effective as a matter of law in accordance with the terms of the rule itself unless a joint resolution of disapproval is enacted into law within prescribed time periods. In the case of a "major rule" as defined in section 802(5), the joint resolution of disapproval must be enacted into law within 90 legislative days of the date the rule was received by the designated officers of the two Houses. In the case of a "non-major rule", the time limit is only 45 legislative days. In other words, under S. 1145, a recommended rule becomes law automatically without any Congressional action once the prescribed time period has elapsed without the enactment of disapproving legislation. This procedure is this quite similar to the "report and wait" procedure, long used in the promulgation of rules of procedure for the federal courts. See *Chadha* 462 U.S. at 935, n.9.

Pursuant to subsection (d), a rule may take effect, irrespective of the 45 or 90 day period, if either House of Congress votes to reject a joint resolution of disapproval. Subsection (e) provides that if Congress adjourns before the expiration of the delay periods, then the rule will not become effective during that Congress. This provision prevents agencies from frustrating the intent behind S. 1145 by delaying transmittal of recommended final rules until shortly before adjournment. This provision places agencies on notice that they must plan their rulemaking agenda in conjunction with these Congressional review procedures. If a recommended final rule is not enacted pursuant to this chapter, then pursuant to subsection (f) the agency may issue another rule relating to the same subject and following the same procedure of S. 1145. The subsequent rule may reflect changes appropriate in light of Congressional consideration of the earlier recommended final rule. Congressional inaction on or rejection of a joint resolution of disapproval is not to be viewed as an expression of approval of the subject rule.

Section 805, "Procedures for consideration of joint resolutions", sets out the expedited procedures for consideration of a resolution of disapproval in both the House and Senate. Expedited procedures are intended to ensure that the Congress has sufficient time to act within the prescribed periods. They also ensure that the decision on whether to disapprove regulations is made by the full Congress, and not by a handful of committee members who may be overly sympathetic to the agency. Without expedited procedures, a committee chairman could prevent full consideration of the disapproval measure by not reporting the resolution until after the waiting period had expired.

Section 806, "Relationship to other law", states that these procedures supersede other provisions of Congressional review or disapproval to the extent such other provisions are inconsistent.

Section 807, "Enforcement" provides for the invocation of Congress' appropriations power as a means of enforcing any disapproval of a rule by joint resolution. Subsection (a) provides that the whole of Section 807 is adopted as an exercise of the power of each

House of Congress to determine the rules of its proceedings and that the provisions of this section are essential to the Congress in exercising its Constitutional responsibility to monitor and review exercises by the executive of delegated powers of a legislative character. Subsection (b) provides that upon passage of a joint resolution—regardless of what the President does upon presentment—it shall not be in order in the Senate or the House to vote on final passage of any bill or resolution making appropriations for the agency which issued such rule, unless such bill or resolution contains provisions which prohibit the use of any funds appropriated by such bill or resolution to issue, promulgate, enforce, or otherwise carry out such rule. Thus, even though a joint resolution agreed to by both Houses is not enacted into law, mere passage of the joint resolution gives rise to a point of order for any appropriations bill involving the relevant agency that does not bar use of government funds to implement the rule. Subsection (c) adds that for rules previously subject to a one-house veto, the passage of a joint resolution of disapproval would give rise to such a point of order.

SECTION 4

Section 4 of the bill establishes that the amendments made by S. 1145 will take effect on the first day of the One Hundredth Congress.

IV. Executive Communication

STATEMENT OF JAMES M. SPEARS, ACTING ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee: I appreciate the opportunity to appear before you today to give the views of the Department of Justice on the expanded congressional review of agency rulemaking proposed by S. 1145, the Rulemaking Procedures Reform Act of 1985.

At the outset, Mr. Chairman, I want to underscore this Administration's strong commitment to regulatory reform. More than any prior administration, I would submit, we have directly confronted both the procedural and substantive aspects of regulatory reform. Procedurally, through Executive Orders 12291 and 12498, President Reagan has put into place a system of presidential oversight of agency rulemaking. We have imposed rulemaking standards on executive branch agencies, to the extent permitted by law; for example, agencies must prepare for major rules a regulatory impact analysis, which includes cost/benefit analysis. Substantively, we have reduced regulatory burdens in many areas, eliminating and revising many existing rules and reducing the number of new rules.

We have made considerable progress on regulatory reform, but we certainly still have far to go. The focus of these hearings must be on whether proposals for increased congressional oversight of rulemaking would advance true regulatory reform. In light of the Supreme Court's decision in *INS* v. *Chadha,* 462 U.S. 919 (1983), holding unconstitutional the "legislative veto," the question we

must all address—and I stress we, since this Administration is committed to working closely with Congress in this area—is whether to enact into law an across-the-board "regulatory veto" of the sort proposed in S. 1145 and other bills. Such a mechanism would attempt to do what the legislative veto did, but in a constitutional manner.

General considerations

The Administration's threshold concern is that across-the-board regulatory reform is such an important matter that it should be addressed in a free-standing statute, debated and voted upon fully on the merits. This means first of all that any comprehensive regulatory reform legislation should be considered separately as one law and not as an amendment to some other legislation, such as an authorization or appropriations bill. We therefore would strongly oppose any effort to attach S. 1145 to the authorization bill for the Federal Trade Commission.

The central importance of regulatory reform also requires that congressional action concerning specific agency rules should be taken in free-standing legislation, not hidden away in an appropriations or other rider. Thus, we oppose provisions, such as proposed section 807 of S. 1145, that would encourage last-minute appropriations riders disapproving agency rules.

Section 807 would amend the congressional rules to provide that as soon as Congress passes a joint resolution disapproving a rule (and before presentment to the President), an appropriations bill will be subject to a point of order if it does not forbid the agency to spend money to enforce the rule. Not only would such a provision complicate the already too complicated appropriations process, but it also would burden the review of an agency rulemaking action with the complex and truly irrelevant issues surrounding an appropriations bill. Neither Congress nor the President—who would be compelled to veto an appropriations bill rather than just a bill limited to the agency rule in question—shoud be forced to conduct substantive regulatory reform in such a fashion.

I note with some concern that the point of order authorized under section 807 would become available before the disapproval resolution is presented for presidential action. Section 807 could be construed as an attempt to bypass the President. It must be recognized that the President's review of a congressional determination on an agency rule should not be prejudiced by premature congressional action and a mechanical linking of the rule to the appropriations process. We feel quite strongly that any "enforcement" procedure must not come into play until the legislative process on the agency rule—of which presidential action is obviously a major component—has been completed.

Having stressed that regulatory reform is so important that it must be addressed comprehensively and on its own merits, let me discuss generally the need for legislation in this area. The Attorney General has expressed to me his personal commitment to working to achieve regulatory reform. He and the rest of the Administration look forward to working with members of this subcommittee and other members of Congress toward that end. We should address jointly many of the difficult concerns that encouraged resort

to the legislative veto device. Before *Chadha*, those concerns were, to a large degree, obscured by constitutional considerations. With the constitutional debate behind us, we believe that the legislative and executive branches now can focus on those underlying concerns, and on whether there are steps that should be taken to improve the efficiency and public accountability of the federal government, consistent with the "single, finely wrought and exhaustively considered, procedure for making laws that is embodied in the Constitution." *INS* v. *Chadha*, 462 U.S. at 951.

We can fully appreciate why rulemaking by federal agencies is often perceived as a form of "lawmaking" that requires a more extensive congressional review role than the usual congressional oversight of other types of executive action. The perception of lessened accountability for government decisions made through rulemaking is exacerbated when the statute authorizing agency rulemaking sets standards that are broad and open-ended. While broad statutory language is occasionally necessary to permit agency discretion to respond to complex regulatory problems, or to fashion a political compromise leading to the passage of legislation, the agency must then fill the interstices left by Congress when it passed the statutory scheme. Such a system understandably sometimes will provoke considerable controversy over whether the agency has reached the correct conclusions regarding legislative intent. Perhaps even more importantly, the concern with regulatory reform stems from a sense that the federal agencies may be "out of control," exercising considerable authority over the lives of individuals and the conduct of business, without being accountable for how such authority is exercised.[1]

The Administration has sought to provdie that accountability through presidential oversight under Executive Orders 12291 and 12498. S. 1145 seeks to provide even more accountability through increased congressional oversight.

Congressional review under S. 1145

S. 1145's core provision is proposed section 804, which would require that agency regulations could not become effective until they had been submitted to Congress for defined layover periods. "Major" rules (annual effect on economy of $100 milion or more, or otherwise designated major by the agency, the President or OMB) would become effective unless a joint resolution disapproving the rule is enacted into law (i.e., passed by both Houses and then signed by the President or his veto overridden) within 90 days of submission to Congress. "nonmajor" rules would only have to lay before Congress for 45 days before becoming effective. Rules could become effective earlier if a disapproval resolution is defeated by one House of Congress before the waiting period expires. "Emergency rules" would be exempt from congressional review, but would automatically expire 120 days after promulgation. Section 805 would amend the Senate and House rules to provide a "fast track" (expedited consideration) for disapproval resolutions. In addition, as discussed above, section 807 would establish a parliamen-

[1] See *Sierra Club* v. *Costle*, 657 F.2d 298, 405–06 (D.C. Cir. 1981).

tary device designed to facilitate passage of appropriations riders prohibiting agency enforcement of a rule disapproved by Congress (but not necessarily by the President).

While the mechanism proposed by S. 1145 could be reworked to technically satisfy minimum constitutional requirements for legislation,[2] we question whether such an approach comports with the traditional notions of legislative authority established by our Constitution through almost 200 year of constitutional history. While the Framers recognized the need to allow the legislative branch to periodically revisit decisions and policies established by previous legislative action, the mechanism chosen was the legislative process itself. Legislative decisions do not become sacrosanct once they have been committed to law; they may be revised, modified or repealed by new legislation. However, nowhere did the Framers suggest that Congress should reserve to itself an opportunity and a power to redebate its prior decisions on a continuing basis through a veto power over executive actions such as implementing regulations. Rather, the Framers envisioned that Congress would make laws with reasonable specificity, reflecting policy judgments and decisions that would guide the Executive in execution of those

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[2] We have constitutional and legal concerns about proposed (§ 804(d) and § 804(b) of S. 1145. First, we believe that proposed § 804(d) constitutes an unconstitutional legislative veto device. Under proposed § 804(c), "Major rules" would take effect at the expiration of 90 days of continuous session, and "nonmajor" rules would take effect at the end of 45 days of continuous session, if no joint resolution of disapproval is enacted into law during that period. Proposed section § 804(d) additionally provides, however, that such rules may take effect immediately upon either House's rejection of a joint resolution of disapproval (or, in the case of the Senate, after disposition of a motion to reconsider such a resolution). As a practical matter, § 804(d) would permit one House of Congress to speed up the effective date of a rule, by rejecting a resolution of disapproval prior to expiration of the required review period. In effect, the section would allow one House of Congress to "waive" the remainder of the statutorily required review period.

As we have previously stated on several occasions, we believe such "acceleration provisions" fall squarely within the Supreme Court's denunciation of legislative veto devices in *Chadha*. The Court settled that an action taken by one House of Congress with "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch," is "essentially legislative in purpose and effect," 462 U.S. at 952, and therefore "requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." Id. at 958. Because proposed § 804(d) conforms to neither aspect of the procedure for legislative action, it is unconstitutional and should be deleted from the bill.

Our concern about proposed § 804(b) is not that the provision contains an unconstitutional legislative veto device, but that the declaration that a final rule promulgated by an agency and filed with the Office of the Federal Register "shall be considered a recommendation of the agency to the Congress" is inconsistent with the congressional review scheme that would be established by this bill, and with the legal distinction between executive actions and proposals for legislation. We believe that final rules promulgated by agencies under this bill would continue to be, in a legal sense, final rules rather than mere "recommendations" and that this bill would function only to limit the rulemaker's authority to make rules legally effective.

Proposed § 804(b)'s characterization of agency final rules as mere "recommendations" disregards the well-settled legal distinction between a legislative proposal, such as a bill, and final executive action under legislatively delegated authority, such as a final rule promulgated by an executive agency. As the Supreme Court made clear in *Chadha*, "[e] xecutive action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require." 462 U.S. 919 n.16.

This distinction is particularly clear in this bill, because by the terms of the bill both major and nonmajor rules will have the force of law unless disapproved by joint resolution within the specified time period. In such cases, the United States Court of Appeals for the District of Columbia has declared that the contention that a final rule is "a mere legislative proposal is easily refuted by comparing the status of the rule to that of a bill introduced in Congress. If neither house of Congress acts to approve a bill, the bill dies; but when neither house acts to disapprove an agency rule, the rule becomes law. Clearly the agency rule has some legal force that a proposed bill does not."

Consumer Energy Council of America v. *FERC*, 673 F.2d 425, 465 (D.C. Cir. 1982), summarily aff'd sub nom. *Process Gas Consumers Group* v. *Consumers Energy Council of America*, 103 S.Ct. 3556 (1983). We therefore, believe that proposed § 804(b) should be deleted from the bill.

laws; and through its ability to legislate, Congress could expand, modify or repeal enactments that might later become the source of dissatisfaction.

Of course, making the political choices that must be made in order to give clear, precise policy guidance to administrative agencies is not easy. In the past, the legislative veto mechanism has often been rationalized as an attractive substitute for making those difficult choices, by giving Congress leverage to pull back particular agency decisions and take another look, free of executive branch input or veto. Yet, we think it is relatively clear that the legislative veto mechanism, in addition to its constitutional infirmities, simply was not effective in checking agency abuses and in fact may have encouraged the passage of vague and overly-broad delegations of authority. Although there has not been any relevant experience with "regulatory veto" mechanisms, such as the one in S. 1145, substantial questions are presented as to whether widespread use of such mechanisms would be similarly counterproductive and would mask, rather than relieve, the fundamental problem of clearly articulating public policies in law.[3]

We have serious concerns about the workability of the S. 1145 congressional review mechanism. It would impose rigid timetables upon Congress and its committees to introduce, debate, report upon, and enact literally thousands of resolutions every year. The cumulative burden of such paperwork could overwhelm committee staffs, and raise serious possibilities for stalemate and delay. Ironically, passage of this legislation, which is intended to curb the discretion of executive branch bureaucrats, would ultimately result in a much larger legislative bureaucracy. The extent to which members of Congress are currently removed from key legislative decisions would be increased and the legislative bureaucracy would be difficult to manage.

Even assuming that Congress could overcome these obstacles and meet its self-imposed deadlines, we have serious questions about the quality of the decisions that could result from such a process. Would only two hours of debate, for example, give Congress adequate opportunity to explore and evaluate the merits of a complex major rule promulgated after the years of agency proceedings pursuant to a statute, such as the Clean Air Act, that itself had been the product of years of congressional deliberation, not to mention the procedural deliberative process prescribed by the Administrative Procedure Act?

The Framers understood that to the extent Congress as a body were to become seriously involved in the process of reviewing the substance of every detailed and complex executive action, it would likely become hopelessly mired in details. As Thomas Jefferson wrote nearly two hundred years ago:

> Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution. The smallest

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[3] Indeed, the mechanism might exacerbate tht problem in yet another way. A joint resolution disapproving an agency rule would not establish a substitute rule or change the underlying law. Its strictly negative nature would thus leave the agency in doubt as to what kind of rule to promulgate and, because of its unclear effect on the law underlying the rule, might create questions about the legal basis for future agency rulemaking on the subject.

> trifle of that kind occupies as long as the most important act of legislation, and takes place of everything else. Let any man recollect, or look over the files of Congress, he will observe the most important propositions hanging over from week to week and month to month, till the occasions have past them, and the thing never done. I have ever viewed the executive details as the greatest cause of evil to us, because they in fact place us as if we had no federal head, by diverting the attention of that head from great to small objects * * *.

11 T. Jefferson, The Papers of Thomas Jefferson 678 (J. Boyd, ed. 1955) (letter to E. Carrington, Aug. 4, 1787).

In short, S. 1145 might create considerable potential for injecting massive delay, uncertainty, and paperwork into the administrative process.[4] It also may cause difficult problems of interpretation in judicial review of agency rulemaking decisions. We should therefore consider whether this congressional review procedure would offer any discernible improvement over the process currently available for reviewing agency rulemaking.

Under Executive Orders 12291 and 12498, the President, through the Office of Management and Budget, maintains considerable oversight over rulemaking by the non-independent executive branch agencies, both to ensure that the agencies scrutinize carefully the legal and factual bases for major rules in order that those rules maximize social benefits and minimize costs to the extent permitted by law, and to ensure a consistent, well-reasoned Administration-wide approach to policies for which the executive branch is responsible. Once the agency has done the regulatory impact analysis required by Executive Order 12291 for a major rule and published the rule in the Federal Register, Congress has time to inform itself about the rule, and legislate to block it, as it has done in the past in exceptional cases on an ad hoc basis—e.g., the statutory overrides of the saccharin ban (P.L. 95-203) and the seatbelt-ignition interlock rule (P.L. 93-492).

Moreover, there is an ongoing informal dialogue between every federal agency and Congress. That dialogue serves both to inform Congress of the agency's plans and interpretations of its statutory authority, and to give the agencies information about congressional concerns and views. This process is supplemented by the considerable political influence that Congress can bring to bear on the agencies, through the authorization and appropriations process and through legislative hearings and inquiries.

My final observation on S. 1145 is to identify what I believe to be the fundamental problem that it does not address. The bill fails to ameliorate the basic difficulty confronting agencies that are dele-

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[4] Another substantial problem stems from the bill's method for computing delayed effective dates of regulations. The periods of 45 days for nonmajor rules and 90 days for major rules would be based on days for "continuous session," which is defind to exclude all adjournments to a date certain of more than three days. Further, adjournment sine die would require resubmittal of a regulation pending at the time of that adjournment and the 45 or 90 day period could not begin again until Congress reconvened. Agencies that must issue regulations to conduct their day to day business would be constrained to invoke the emergency exception for many of their regulatory documents, just to avoid the potential months of delay under the continuous session provision.

gated rulemaking authority: that the statutory criteria under which such authority is granted in all too many cases are not well-defined, are too broad, and provide only limited guidance to the agencies in the exercise of their discretion.

While we agree that some agencies on occasion have acted beyond the limits of their authority, we believe that the roots of agency activism can often lie in the vaguely-defined objectives and standards found in many regulatory statutes. Of course, general delegations of power to administrative agencies are inevitable, given the sophistication and complexity of the technical areas covered by many regulatory statutes and the institutional constraints upon the time and resources of Congress. However, as the full Senate Judiciary Committee acknowledged in its report in the 97th Congress on S. 1080,[5] Congress has frequently asked the agencies to make the basic, vitally important policy choices that are more properly for the legislature to make.

To the extent that statutes give the agencies clear, precise guidance as to how and to what ends discretion should be exercised, all our jobs would be easier. The executive branch would have a clearer view of its responsibility to execute the laws, and therefore would be better able to keep administrative agencies politically accountable; Congress would not be faced with agency rulemaking that distorts or exceeds what Congress intended in the statute; and the courts would be better able to determine whether particular agency action lies within the scope intended by Congress when it delegated the authority in question. Most importantly, this process would be more fully in accord with the lawmaking and law-executing processes envisioned by the Framers of the Constitution, processes that were intended to be political and subject to democratic controls.

In this regard, I must repeat what I said earlier: an unfortunate side effect of S. 1145 is that, by providing Congress a "second look" at programs and policy, it would encourage even less precision in the legislative process than is currently reflected in the acts of Congress.

Before closing, let me highlight one area that a comprehensive regulatory reform legislative initiative might address: the accountability of the independent regulatory agencies and commissions, the so-called "fourth branch" of government that exists largely outside the day-to-day control of either the President or Congress.

Presidential control over independent regulatory agencies

Central to the Supreme Court's analysis in *Chadha* is the well-founded proposition that the Constitution recognizes only three branches of the federal government—legislative, executive, and judicial—and that the respective spheres of power of those three branches are identifiable and distinct:

> Although not "hermetically" sealed from one another, the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it.

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[5] S. Rept. No. 284, 97th Cong., 1st sess. 164 (1981).

> When the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Art. II. And when * * * Congress purports to act, it is presumptively acting within its assigned sphere. 462 U.S. at 951–952 (citations omitted).

As the Court recognized in *Chadha,* the fundamental intent of the tripartite scheme designed by the Framers was to ensure that each branch fulfills the functions for which it is best suited, and that each branch is accountable for performance of those functions. And, the Supreme Court reminded us, the division of powers among the three Branches was to assure

> As nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted. Id. at 951.

It is difficult to reconcile this constitutional scheme with the reality of regulation by the mixed assortment of commissions, agencies, government or quasi-government corporations, authorities, institutions, and boards generally referred to as "independent" regulatory agencies. Historically, the premise underlying creation of such "independent" agencies was that some forms of regulation (primarily adjudication and investigation) "should be entrusted to nonpartisan 'experts' whose decisions are free from 'political' supervision by the President." H. Bruff, "Presidential Power and Administrative Rulemaking," 88 Yale L.J. 451, 480 (1979). Whatever its original validity, however, that premise now seems questionable.

Today, executive branch agencies that cannot be characterized as "independent" engage in rulemaking in a functionally indistinguishable fashion from so-called "independents," and many of the responsibilities and functions of the independent agencies overlap considerably with responsibilities and functions placed by Congress in other executive branch agencies. In fact, Congress has recently seen fit to transfer to executive branch agencies some functions performed by these "independent" agencies. For example, Congress has transferred a number of functions exercised by the Civil Aeronautics Board with respect to foreign and domestic air transportation to the Department of Transportation and the U.S. Postal Service. Public Law 95–504, § 40(a), 92 Stat. 1744, 49 U.S.C. § 1551; Public Law 98–443, § 3(a), 98 Stat. 1703.

By and large, the independent agencies are not cohesive, centrally managed, or, most importantly from a constitutional standpoint directly accountable in any effective way to the Congress or the President, those organs of government to whom the Constitution gave exclusive power to make and to execute the laws. In the wake of *Chadha,* it is appropriate to reexamine whether responsibility for administrative and regulatory execution and enforcement of our laws—clearly executive branch functions—should be vested in governmental entities that are not directly accountable to our elected President.

We believe that some of the energy being expended in seeking alternatives to legislative vetoes should be channeled into efforts to return lawmaking and law-executing authority to the political branches of the government, as intended so clearly by the Framers of the Constitution. As a beneficial byproduct, this process might well expose governmental authority that is not only lodged improperly in various politically unaccountable agencies, but is not even the proper business of the federal government. The primary objective, however, should be to reaffirm that in our system governmental power must be allocated in a manner that allows for direct political accountability in the spheres of lawmaking and law-executing.

Several of the regulatory reform bills that have been advanced in recent years would enhance the accountability of the independent agencies to the executive branch, at least with respect to the rulemaking functions of those agencies. Such bills as S. 1080 and H.R. 3939, 98th Congress, would include independent agencies and commissions within the definition of "agency", for the purposes of the bills. Unlike S. 1145, those bills would give the President the authority: to establish procedures for agency compliance with detailed provisions requiring a regulatory analysis for every "major rule;" to monitor, review and ensure agency implementation of such procedures; and to designate "major rules." The President would thus receive a measure of control over rulemaking by the independent agencies.

I do not mean to suggest that the Administration endorses any of the particular proposals that would provide for increased executive branch control over the rulemaking of these so-called independent agencies. Nonetheless, I believe the time has come—in the context of regulatory reform—to give very serious consideration to the problem of the unaccountability of the independent agencies, which after all execute the law and therefore functionally belong as a part of the executive branch.

Conclusion

Because my testimony has focused on several substantive problems that the Department has identified in the proposal, the tone of this presentation has been negative. I do not want to leave the subcommittee with that impression. I want to reiterate the Administration's commitment to regulatory reform and to working closely with Congress to determine whether regulatory reform can be furthered by legislation concerning the rulemaking process. We are convinced that regulatory reform should include at least the following: easing inappropriate regulatory burdens through cost/benefit analysis and otherwise; presidential oversight over agency rulemaking; and congressional attention to making the hard policy choices required by disciplined lawmaking and avoiding overly broad delegations of rulemaking authority. What we all must consider now is whether expanded congressional review of rulemaking would also contribute to that comprehensive approach to regulatory reform.

That concludes my prepared statement, Mr. Chairman. I would be happy to answer any questions you and other members of the subcommittee may have.

V. Regulatory Impact Statement

Pursuant to the requirements of paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee has concluded that no direct regulatory or paperwork impact will result from enactment of S. 1145.

This legislation does not create any new regulations with which the public must comply, and is targeted solely at the activities of the agencies themselves.

VI. Estimated Cost of Legislation

U.S. Congress,
Congressional Budget Office,
Washington, DC, August 15, 1986.

Hon. Strom Thurmond,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 1145, the Rulemaking Procedures Reform Act of 1985, as ordered reported by the Senate Committee on the Judiciary, July 17, 1986. This bill establishes procedures for Congressional oversight of agency rules. Beginning with the 100th Congress, all rules will be subject to the provisions of this legislation. The cost of this bill could range from negligible to several million dollars per year, depending on the manner in which Congressional committees implement the oversight mechanism established by the bill.

The major potential costs of this bill would result from the additional Congressional workload from conducting the review. The key element in determining the cost of this review is the assumption as to its scope. The possibilities range from a careful review of each proposed rule to the extensive review of only selected major or controversial rules. Thus, a wide range of assumptions is possible, with a resulting wide range in possible costs.

If a detailed review of every proposed significant rule is conducted by both Senate and House committees, enactment of this bill could result in a cost to the federal government of several million dollars per year for additional Congressional staff and overhead. However, based on information from the staff of various committees, it appears that committees would most likely conduct a detailed review of only the most controversial rules or rules of particular interest to the committee, many of which are discussed by the Congress in any event. In that case, the cost of this bill would be negligible.

Enactment of this bill would not affect the budgets of state or local governments.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

Rudolph G. Penner.

VII. Committee Action and Vote

The Committee conducted a hearing on S. 1145 on July 9, 1985 (Subcommittee on Administrative Practice and Procedure). The bill was reported out of the Committee, as amended, on July 17, 1986 by roll call vote, as follows:

YEAS (12)	NAYS (5)
Thurmond	Biden (by proxy)
Mathias	Kennedy (by proxy)
Laxalt	Metzenbaum
Hatch (by proxy)	Leahy
Simpson	Simon
Grassley	
Denton	
Specter (by proxy)	Absent (1)
McConnell	
Broyhill	Byrd
DeConcini	
Helfin	

Prior to final passage, Senator Metzenbaum offered the following amendment: "strike lines 7–26, page 19; strike lines 1–12, page 20."

This amendment would remove the appropriations enforcement section of the bill (S. 807).

The Metzenbaum amendment was defeated by roll call vote, as follows:

YEAS (6)	NAYS (11)
Mathias	Thurmond
Biden (by proxy)	Laxalt
Kennedy (by proxy)	Hatch (by proxy)
Metzenbaum	Simpson
Leahy	Grassley
Simon	Denton
	Specter (by proxy)
Absent (1)	McConnell
	Broyhill
Byrd	DeConcini
	Helfin

Prior to final passage, Senator Heflin, for himself and Senator Denton, offered the following amendment:

> On page 2, line 15, strike out, "statement.' ;" and insert in lieu thereof "statement, but such term does not include agency statements involving a matter relating to public property or contracts or general statements of policy of the Tennessee Valley Authority except where an applicable statue requires notice and hearing pursuant to this chapter or the statement to be made on the record after opportunity for an agency hearing.' ;"

This amendment adds a section to the definition of section 551(4), the section setting forth the definition of the term "rule".

This amendment to the bill was adopted by a voice vote.

VIII. Minority Views of Mr. Biden

I oppose the enactment of S.1145, which, I believe, is an undisguised effort to revive the legislative veto. I do so not because I believe that the administrative agencies should have unfettered power or that every regulation implemented by the regulatory agencies is just and wise. Rather, I oppose S.1145 because of its potential effect on the work of the United States Senate.

Enactment of this bill will ensure that the Senate spends a considerable portion of its time debating subjects it should not be considering at all. Not long ago, the Senate spent days of floor time debating a proposed regulation of used car dealers; another time, we spent a week debating whether Coca-Cola got a fair shake under a proposed rule. We simply cannot afford to take that much time to review every regulation which, rightly or wrongly, impinges on a particular industry. Moreover, the Congressional Budget Office has estimated that it may cost several million dollars a year to pay for the additional staff and overhead that would be needed to implement this bill.

In short, we cannot become the court of appeals for the regulatory agenices. We do not have the staff resources and we cannot afford the time. In this era of highly paid lawyers and lobbyists, I have no doubt that every interest affected by a particular regulation would attempt to find a sponsor for its position. There would be no regulation, no matter how insignificant, that might not become the subject of extended debate. It is for this reason that I oppose enactment of S.1145.

Joseph R. Biden, Jr.

IX. Changes in Existing Law

In compliance with paragraph (12) of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1145 are as follows: Existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman.

UNITED STATES CODE

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TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

PART I—THE AGENCIES GENERALLY

Chapter

	Sec.
* * * * * * *	
7. Judicial Review	701
8. Agency Accountability	*801*
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CHAPTER 5—ADMINISTRATIVE PROCEDURE

Sec.

551. Definitions

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553. Rule making.

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§ 551. Definitions

For the purpose of this subchapter—

* * * * * * *

[(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;**]**

(4) "rule" means the whole or part of an agency statement of general or particular applicability designed to implement, inter-

pret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of an agency and includes—

(A) the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor, or of valuations, costs, or accounting, or practices bearing on any of the foregoing; and

(B) any amendment, revision, or repeal of such an agency statement, but such term does not include agency statements involving a matter relating to public property or contracts or general statements of policy of the Tennessee Valley Authority except where an applicable statute requires notice and hearing pursuant to this chapter or the statement to be made on the record after opportunity for an agency hearing;

* * * * * * *

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; **[**and**]**

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter**[**.**]**; *and*

(15) "emergency rule" means a rule which is temporarily effective prior to the expiration of the otherwise specified periods of time for public notice and comment under this subchapter and which was duly promulgated by an agency pursuant to a finding that delay in the effective date thereof would—

(A) seriously injure an important public interest,

(B) substantially frustrate legislative policy and intent, or

(C) seriously damage a person or class of persons without serving any important public interest.

* * * * * * *

§ 553. Rule making

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(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

* * * * * * *

Except when notice or hearing is required by statute, this subsection does not apply—

* * * * * * *

[(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.**]**

(B) when the agency for good cause finds that public notice and comment are unnecessary due to the routine nature or

matter or insignificant impact of the rule, or that an emergency rule should be promulgated.

An agency which finds that clause (A) or (B) of this subsection applies to a rule shall publish in the Federal Register with the final rule a statement of such finding and a brief description of reasons for such finding. The provisions of clauses (A) and (B) of this subsection shall not preclude an agency from—

(i) inviting persons representing different points of view to submit comments,

(ii) creating an advisory committee to report, or

(iii) using such other devices to obtain suggestions,

regarding the content of proposed rules prior to notice of rule making.

[(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.]

(c) Except as provided in subsection (e) with respect to an emergency rule, and after notice required by this section, the agency shall give interested persons not less than 60 days to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. The agency may extend the 60-day period if the agency determines that such period is insufficient to permit diligent interested persons to prepare comments or that other circumstances justify an extension of such period. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

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(e) Unless earlier withdrawn by the agency, earlier disapproved by a joint resolution of Congress pursuant to chapter 8 of this title, or earlier set aside by court action, an emergency rule shall terminate 120 days after the date on which it is promulgated.

[(e)](*f*) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

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CHAPTER 7—JUDICIAL REVIEW

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CHAPTER 8—AGENCY ACCOUNTABILITY

Sec.
801. Findings and purposes.
802. Definitions.
803. Agenda; transmission of rules.

804. Review of agency rules.
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§ 801. Findings and purposes

(a) The Congress finds and declares that—

(1) agencies issue a large number of rules that have a significant impact on the Nation;

(2) these agencies are staffed by persons who are not elected and who are therefore not directly accountable to the public;

(3) some of the rules issued by these agencies may conflict with or duplicate other rules or may not conform with legislative intent;

(4) conflicting or duplicative rules may contribute to governmental inefficiency, and rules which do not conform with legislative intent may frustrate the purposes and implementation of congressionally mandated programs; and

(5) conflicting or duplicative rules and rules which do not conform with legislative intent may also impose unnecessary burdens on State and local governments.

(b) Therefore, it is the purpose of this chapter to assure increased agency accountability to the public through their elected officials and through adherence to legislative intent in the issuance of agency rules.

§ 802. Definitions

For purposes of this chapter:

(1) The term "agency" has the same meaning as in section 551(1) of this title.

(2) The term "rule" has the same meaning as in section 551(4) of this title, except that such term does not include—

(A) a rule or statement described in section 553(b)(A) of this title, unless such rule or statement has general applicability and substantially alters or creates rights or obligations of persons outside the agency;

(B) a rule of particular applicability that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; and

(C) a rule if—

(i) the agency made a finding with respect to such rule under section 553(b)(B) of this title; and

(ii) on the date on which the agency promulgates the rule, the head of the agency submits a copy of the statement required to be published in the Federal Register under such section to the chairman and ranking minority member of the appropriate committees.

(3) The term "joint resolution" means only an unamendable joint resolution which contains no preamble and the matter after the resolving clause of which is as follows: 'That the Senate and the House of Representatives disapprove the recommended final rule issued by dealing with the matter of

, which rule was transmitted to the Congress on .';
the first blank being filled with the name of the agency issuing the rule, the second blank being filled with the title of the rule and such further description as may be necessary to identify it, and the third blank being filled with the date of transmittal of the rule to the Congress.

(4) The term "appropriate committee" means the committee of the House of Representatives and the committee of the Senate which has primary legislative jurisdiction over the statute pursuant to which an agency issues a rule.

(5) The term "major rule" means—

(A) a rule or a group of closely related rules that the agency, the President, or an officer of the Government designated by the President reasonably determines is likely to have an annual effect on the economy of $100,000,000 or more in reasonably quantifiable direct and indirect costs; or

(B) a rule or a group of closely related rules that is otherwise designated a major rule by the agency proposing the rule, or is so designated by the President or an officer of the Government designated by the President, on the ground that the rule is likely to result in—

(i) a substantial increase in costs or prices for wage earners, consumers, individual industries, nonprofit organizations, Federal, State, or local government agencies, or geographic regions; or

(ii) significant adverse effects on competition, employment, investment, productivity, innovation, the environment, public health or safety, or the ability of enterprises whose principal places of business are in the United States to compete in domestic or export markets.

(6) The term "emergency rule" has the same meaning as in section 551(15) of this title.

§ 803. Agenda; transmission of rules

(a) Each agency shall prepare an agenda listing all areas in which the agency intends to propose rules within the following twelve-month period. The agency shall transmit such agenda or relevant portion thereof to the appropriate committee of the Senate and the appropriate committee of the House of Representatives. Failure to list an area of possible rule making on an agenda shall not preclude an agency from proposing or issuing any rule. The agenda, or relevant portion thereof, shall be transmitted to the appropriate committees within one hundred and eighty days after the effective date of this chapter and semiannually thereafter.

(b) On the day an agency forwards to the Federal Register for publication a recommended final rule, the agency shall transmit to the Secretary of the Senate and the Clerk of the House of Representatives a copy of such rule and a copy of any other materials transmitted to the Federal Register for publication with respect to such rule. The Secretary of the Senate and the Clerk of the House of Representatives are authorized to receive a recommended final rule under this subsection whether the appropiate House is in session, recess, or adjournment.

(c) On the day on which the Secretary of the Senate and the Clerk of the House of Representatives receive a recommended final rule, the Secretary and the Clerk shall transmit a copy of such rule and any materials received with respect to such rule to the appropriate committees.

§ 804. Review of agency rules.

(a) For purposes of this section and section 805 of this title—

(1) "days" means only days of continuous session of Congress;

(2) continuity of session is broken by an adjournment sine die at the end of a Congress; and

(3) the days on which either House is not in session for more than three days because of an adjournment or recess to a day certain shall be excluded in the computation of days of continuous session of Congress.

(b) Notwithstanding any other provision of law, any final rule shall be considered a recommendation of the agency to the Congress and shall have no force and effect as a rule unless such rule has become effective in accordance with this chapter.

(c)(1) Notwithstanding any other provision of law, a recommended final rule shall become effective in accordance with its terms unless—

(A) in the case of a recommended final major rule, a joint resolution is enacted into law within 90 days after the first day of continuous session of Congress after the day on which such rule is received by the Secretary of the Senate and the Clerk of the House of Representatives under section 803(b) of this title; or

(B) in the case of a recommended final nonmajor rule, a joint resolution is enacted into law within 45 days after the first day of continuous session of Congress after the day on which such rule is received by such Secretary and such Clerk under such section.

(2) Whenever an appropriate committee reports a joint resolution pursuant to this chapter, the joint resolution shall be accompanied by a committee report specifying the reasons for the committee's action.

(d) Notwithstanding paragraph (1) of subsection (c), a recommended final rule may become effective at any time after the day on which either House of Congress defeats a joint resolution, and, in the case of the Senate, a motion to reconsider such joint resolutions disposed of.

(e) If Congress adjourns sine die at the end of a Congress prior to the expiration of the period specified in subparagraph (A) of subsection (c)(1) with respect to a recommended final major rule, or prior to the expiration of the period specified in subparagraph (B) of such subsection with respect to a recommended final nonmajor rule, as the case may be, the rule shall not become effective during that Congress. The agency which issued such recommended final rule may transmit such rule at any time after the first day of the following Congress in accordance with section 803(b) of this title, and the period specified in subparagraph (A) or (B) of subsection (c)(1), as the case may be, with respect to such rule shall begin on the day such rule is transmitted to the Congress.

(f)(1) If a recommended final rule of an agency does not become effective under this chapter, the agency may issue a recommended final rule which relates to the same acts or prices as the rule which did not become effective under this chapter. Such recommended final rule—

(A) shall be based upon—

(i) the rule making record of the recommended final rule which did not become effective under this chapter; or

(ii) such rule making record and the record established in supplemental rule making proceedings conducted by the agency in accordance with section 553 of this title, in any case in which the agency determines that it is necessary to supplement the existing rule making record; and

(B) may reflect such changes as the agency considers necessary or appropriate including such changes as may be appropriate in light of congressional debate and consideration of the joint resolution with respect to the rule.

(2) An agency after issuing a recommended final rule under this subsection, shall transmit such rule to the Secretary of the Senate and the Clerk of the House of Representatives in accordance with section 803(b) of this title, and such rule shall only become effective in accordance with this chapter.

(g) Congressional inaction on or rejection of a joint resolution with respect to a recommended final rule shall not be deemed an expression of approval of such rule.

§805. Procedures for consideration of joint resolutions

(a) The provisions of this section and sections 802(3), 803(c) and 804(c)(2) of this title are enacted by Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of joint resolutions; and they supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

(b) Except as provided in subsection (e) of this section, joint resolutions shall, upon introduction or receipt from the other House of Congress, be immediately referred by the presiding officer of the Senate or House or Representatives to the appropriate committee of the Senate or the House of Representatives, as the case may be.

(c)(1)(A) Except as provided in subparagraph (B) of this paragraph, if the committee to which a joint resolution has been referred does not report such joint resolution—

(i) in the case of a joint resolution with respect to a recommended final major rule, within 60 days after the first day of continuous session of Congress after the day on which such rule is received by the Secretary of the Senate and the Clerk of the House of Representatives under section 803(b) of this title;

(ii) in the case of a joint resolution with respect to a recommended final nonmajor rule, within 30 days after the first day of continuous session of Congress after the day on which such rule is received by such Secretary and such Clerk under such section,

it shall be in order to move to discharge the committee from further consideration of such joint resolution.

(B) If the committee to which a joint resolution transmitted from the other House has been referred does not report such joint resolution—

(i) in the case of a joint resolution with respect to a recommended final major rule, within 20 days after the date of transmittal of such joint resolution from the other House; or

(ii) in the case of a joint resolution with respect to a recommended final nonmajor rule, within 10 days after the date of transmittal of such joint resolution from the other House,

it shall be in order to move to discharge the committee from further consideration of such joint resolution.

(2)(A) Any motion to discharge under paragraph (1) of this subsection in the Senate may be made by one Senator and is privileged (except that it may not be made after a joint resolution has been reported with respect to the same rule).

(B) Any motion to discharge under paragraph (1) of this subsection in the House of Representatives must be supported in writing by one-fifth of the Members of the House of Representatives, duly chosen and sworn, is highly privileged, and may be filed—

(i) in the case of a joint resolution with respect to a recommended final major rule, within 20 days after the first day of continuous session of Congress after the day on which the Secretary of the Senate and the Clerk of the House of Representatives receive such rule under such section 803(b) of this title; or

(ii) in the case of a joint resolution with respect to a recommended final nonmajor rule, within 10 days after the first day of continuous session of Congress after the day on which the Secretary and such Clerk receive such rule under such section.

(C) Debate on any motion to discharge under paragraph (1) of this subsection in the Senate or the House of Representatives shall be limited to not more than one hour, the time to be divided in the Senate equally between, and controlled, by the majority leader and the minority leader or their designees, and to be divided in the House of Representatives equally between those favoring and those opposing the motion to discharge. An amendment to the motion is not in order.

(d)(1) Except as provided in paragraphs (2) and (3) of this subsection, consideration of a joint resolution shall be in accord with the rules of the Senate and of the House of Representatives, respectively.

(2) When a committee has reported or has been discharged from further consideration of a joint resolution, or when the companion joint resolution from the other House has been placed on the calendar of the first House, it shall be in order, notwithstanding the provisions of rule XXII of the Standing Rules of the Senate or any other rule of the Senate or the House of Representatives, at any time thereafter (even though a previous motion to the same effect has been disagreed to) to move to proceed to the immediate consideration

of either such joint resolution. The motion is highly privileged in the House and privileged in the Senate and is not debatable. An amendment to the motion is not in order.

(3) Debate on a joint resolution shall be limited to not more than two hours (except that when one House has debated its joint resolution, the companion joint resolution shall not be debatable), which shall be divided in the House of Representatives equally between those favoring and those opposing the joint resolution and which shall be divided in the Senate equally between, and controlled, by the majority leader and the minority leader or their designees. A motion further to limit debate is not in order. An amendment to, or motion to recommit, the joint resolution is not in order. A motion to reconsider shall be in order only on the day on which occurs the vote on adoption of the joint resolution, and shall not be debatable. Any other motions shall be decided without debate.

(e) If a joint resolution has been ordered reported or discharged from the committee of the House to which it was referred, and that House receives a joint resolution with respect to the same rule from the other House, the joint resolution of the other House shall be placed on the appropriate calendars of the first House. If prior to the disposition of a joint resolution of one House, that House receives the companion joint resolution from the other House, the vote in the first House shall occur on the joint resolution of the other House.

§ 806. Relationship to other law

"The provisions of this chapter supersede any other provision of law requiring action by one or both Houses of Congress for congressional review or disapproval of agency rules to the extent such other provisions are inconsistent with this chapter.

§ 807. Enforcement

(a) This section is adopted as an exercise of the power of each House of Congress to determine the rules of its proceedings. The Congress specifically finds that the provisions of this section are essential to the Congress in exercising its constitutional responsibility to monitor and to review exercises by the Executive of delegated powers of a legislative character.

(b) Except as provided in subsection (c) of this section, after the Senate and the House of Representatives adopt a joint resolution with respect to a rule pursuant to this chapter, it shall not be in order in the Senate or the House to vote on final passage of any bill or resolution making appropriations for the agency which issued such rule unless such bill or resolution contains provisions which prohibit the use of any funds appropriated by such bill or resolution to issue, promulgate, enforce, or otherwise carry out such rule.

(c) In any case in which, prior to the effective date of this chapter, Federal law provided that a rule subject to this chapter could not take effect if such rule was disapproved by action of only one House of Congress, the provisions of subsection (b) of this section shall apply to such rule on and after the date on which either the Senate or the House of Representatives passes a joint resolution under this chapter with respect to such rule.

(d) An appeal of a ruling of the presiding officer sustaining a point of order raised under this section shall require the approval of a majority of members of the Senate or the House of Representatives, as the case may be, present and voting, to overrule the ruling of the Presiding Officer. On all appeals under this section there shall be one hour of debate equally divided.

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